

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 16 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0197
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
CHRISTOPHER RUSSELL REEDER,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080468

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Laura Chiasson

Tucson  
Attorneys for Appellee

R. Lamar Couser

Tucson  
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Christopher Reeder was convicted of one count of aggravated assault causing serious physical injury. The trial court sentenced him to an aggravated prison term of fifteen years. On appeal, Reeder challenges the trial court's

conclusion that no prosecutorial misconduct occurred during closing arguments. For the following reasons, we affirm.

### **Factual and Procedural Background**

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Reeder met the victim in 2006, and they became friends over the months that followed. Later, Reeder told the victim that he was leaving town, and they did not see each other again until the day of the attack. On December 30, 2007, Reeder knocked on the victim’s door, and after the victim opened the door, Reeder attacked him. The victim escaped and was eventually taken to a hospital for treatment. Reeder was charged with two counts of aggravated assault, one causing serious physical injury and the other with a deadly weapon or dangerous instrument. A jury acquitted him of the charge of aggravated assault with a deadly weapon but found him guilty of aggravated assault causing serious physical injury. This appeal followed.

### **Discussion**

¶3 Reeder argues that the trial court erred when it concluded that a comment the prosecutor made during his closing argument was not improper, did not amount to prosecutorial misconduct, and did not require the trial court to declare a mistrial.<sup>1</sup> Reeder contends the state improperly reminded the jury that he had not testified, violating his

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<sup>1</sup>Although Reeder did not specifically move for a mistrial, the trial court treated his objection as such. Because a mistrial would be the remedy for prejudicial prosecutorial misconduct, *see State v. Newell*, 212 Ariz. 389, ¶¶ 60, 67, 132 P.3d 833, 846, 847 (2006), we review his objection with this standard in mind.

right not to testify, as guaranteed by the Fifth Amendment of the United States Constitution and by article II, § 10 of the Arizona Constitution. We review a trial court's denial of a request for the declaration of a mistrial based on alleged prosecutorial misconduct for an abuse of discretion. *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006). "The defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* ¶ 60, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶4 "The test to judge impermissible comment upon a defendant's assertion of his fifth amendment right not to testify is 'whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985), *quoting United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984). But a "prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify." *Id.*; *see also State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008).

¶5 During the state's closing argument, the prosecutor said:

Then, we thought maybe, after opening statements, [Reeder], through his attorney, would give us some explanation for why this happened. And I want to remind you of some of the things [defense counsel] told us in opening statements yesterday, that he made some obtuse[,] vague reference, [asking] what does Reeder find in [the victim]'s home when he stayed there that may have caused this to happen[;] there

may be evidence for why it happened, may be explanations in that regard[. And here we are in that regard, and we heard all the evidence, and we still don't know why.

During his opening statement, defense counsel had stated there would be an explanation about why the attack had taken place. But, counsel did not specify who would provide that explanation or what evidence would be presented.

¶6 In response to Reeder's objection during the state's closing argument, the trial court concluded that the statement was not a reference to Reeder's decision not to testify because he had "called several witnesses, any one of them or all of them who presumably could have provided information concerning some reason why this may have occurred." We agree. The prosecutor neither directly stated nor called attention to the fact that Reeder had not testified. *See Fuller*, 143 Ariz. at 575, 694 P.2d at 1189. Because defense counsel had not stated during his opening statement that Reeder would be the witness who would provide the evidence to which counsel was referring, the prosecutor's comment that no such evidence had been presented did not implicate Reeder's decision not to testify. Instead, it was a permissible general comment on the lack of exculpatory evidence presented at trial. *See id.*; *see also State v. Garcia*, 173 Ariz. 198, 201, 840 P.2d 1063, 1066 (App. 1992) (prosecutor's statement not improper because it was "more in the nature of a comment on appellant's failure to present exculpatory evidence in the face of strong evidence against him rather than a comment on his silence"). Thus, the trial court did not abuse its discretion by overruling Reeder's objection to the prosecutor's statement.

## Conclusion

¶7 In light of the foregoing, we affirm Reeder's conviction and sentence.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge